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IN THE

Supreme Court of the United States.

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October Term, 1905.

No. 245.

THOMAS G. BUSH, THOMAS A. GILLESPIE and ORION L. HURLBUT, as Trustees in Bankruptcy of the SOUTHERN CAR & FOUNDRY COMPANY, a Bankrupt, Plaintiffs in Error,

versus

J. M. ELLIOTT, JR.

No. 246.

THOMAS G. BUSH, THOMAS A. GILLESPIE and ORION L. HURLBUT, as Trustees in Bankruptcy of the SOUTHERN CAR & FOUNDRY COMPANY, a Bankrupt, Plaintiffs in Error,

versus

ELLIOTT CAR COMPANY.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

JOHN P. TILLMAN,
GEORGE D. LANCASTER,
JAMES H. BEAL,
for Plaintiffs in Error.

WILLIAMS & LANCASTER,
TILLMAN, GRUBB, BRADLEY & MORROW,
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Reply Brief for Plaintiffs in Error.

The original brief, filed on behalf of the plaintiffs in error, discussed the two questions raised by the specifications of error, namely:

(1) That the word *property* in Section 23a of the Bankruptcy Act of 1898 does include a suit to recover a *money* claim or demand; and,

(2) That, under said Section of the Bankruptcy Act the jurisdiction of the Circuit Court of the United States, in "all controversies at law or in equity, as distinguished from proceedings in bankruptcy, between trustees *as such* and adverse claimants," depends exclusively upon the diversity of citizenship between the *bankrupt* and the *adverse claimant*, and not upon the diversity of citizenship between the *trustees* and such adverse claimants.

On both of these questions the decision of the lower court was adverse to the contention made by plaintiff below. Since then, however, this Court in *Pirie vs. Chicago Title & Trust Company*, 182 U. S. 438, has held that *money is property* within the meaning of our present bankruptcy law; and, therefore, counsel for appellees seems to have abandoned his previous earnest insistance on this point and to have relied only on the second question presented.

We desire now to reply to this brief filed on behalf of appellees.

The insistence of counsel is:

(1) That Section 23a only means to confirm in the Circuit Courts of the United States the jurisdiction already conferred by the Judiciary Acts; and,

(2) That Section 23b means the same thing, with this addition—the consent proviso contained in that subsection.

(Brief for Appellees, p. 6).

If this construction of Section 23 is correct, it seems unfortunate (to appellants at least) that Congress should have expressed an intent so simple in language so complicated and misleading.

That part of Section 23a which fixes the jurisdiction of the Circuit Courts in controversies between trustees *as such*

and adverse claimants is this, the jurisdiction of the Circuit Courts in such matters shall be:

> "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants."

Now, when we come to counsel's argument (p. 8 of brief) we find that in effect he transposes these two sentences of Section 23a and, to give to that Section the coloring desired, makes it read as follows, the jurisdiction of the Circuit Court in such matters shall be:

> "as though such controversies had been between the bankrupt and such adverse claimants, but only in the manner and to the same extent as though bankruptcy proceedings had not been instituted."

By transposing in this manner the words in Section 23a, the plausible argument is made that Congress by this circumlocution in expression intended to provide that jurisdiction should remain in that Court as provided by the Judiciary Act; but, if in this we are correct, the sufficient answer to counsel's argument is that Congress did not so enact Section 23a.

The next process to which counsel subjects this same sub-section is one of elimination. It will be seen from this brief (p. 8-9) that in his argument he eliminates altogether from that sub-section the words:

> "and such controversies had been between the bankrupt and such adverse claimants,"

And by this means he makes Section 23a read:

> "The United States Circuit Courts shall have jurisdiction of all controversies....between trustees as such and adverse claimants..... in *the same manner* and to the *same extent only* as though bankruptcy proceedings had not been instituted."

Had Congress seen fit to express Section 23a in this form, then might counsel ask, as he does in his brief (p. 8),

> "What is the *manner* in which and the *extent* to which a Circuit Court of the United States would have had jurisdiction if the Southern Car & Foundry Company had been plaintiff and Elliott defendant?"

And this question counsel might have properly answered as he has answered the question presented in the case at bar:

> "The jurisdiction in that event would have been to the extent of the cases enumerated in the Judiciary Act and *none other*."

Having given, in this manner, a satisfactory construction to Section 23a, the next difficulty that presented itself was, how to dispose of Section 23b. It was apparent that Section 23a dealt only with the jurisdiction of the Circuit Court and that, too, regardless of whether the suit was brought therein by the "trustee *as such*" or by "adverse claimants"; but Section 23b, while limited in its direct application to "suits brought or prosecuted by the trustee," nevertheless had a broader application than Section 23a in this, that it controlled the jurisdiction of all courts—State and Federal—in the matter of "suits brought or prosecuted by the trustee." In this latter respect Section 23b, by its express terms and in language most simple and direct, provided that:

> "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt.....might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, etc."

It would seem to require no high degree of discernment to conclude that, if the trustee only be permitted to bring suit in the Courts,

> "*Where the bankrupt might have brought suit* if bankrupcty had not occurred," the trustee certainly had authority to bring suit in the court "*where the bankrupt might have brought suit if bankruptcy had not occurred.*"

Therefore, in the case at bar, as the bankrupt, the Southern Car & Foundry Company, a citizen of New Jersey, might have brought this suit against Elliott, a citizen of Alabama, in the Circuit Court of the United States for the Northern District of Alabama, "if proceedings in bankruptcy had not occurred," it would seem to follow that the trustees of the bankrupt "as such" would have the same right.

The difficulty, thus suggested, counsel easily rids himself of by making his transformed product of Section 23a swallow up and consume all of Section 23b except the "consent clause" therein contained, and, in this manner, he is enabled to conclude that the practical effect of Section 23b is merely to enable any court to take jurisdiction of a suit brought by a trustee in event the proposed defendant assents thereto.

A correct analysis of counsel's brief we think will show that in-so-far as his conclusion can be said to be plausible in the light of his argument, the result is reached by two false processes: In one instance, he in effect transposes the language of Section 23a, thus making of that Section a different thing from the reality; and, in another, he eliminates from that Section the very sentence that in our judgment is determinative of the meaning intended by Congress. Having in this manner subjected Section 23a to a process of re-construction, he attempts to give meaning to Section 23b by amalgamating it with his mutilated Section 23a and, by thus urging the two into one, he is enabled to reach his conclusion—

> "The evident intent of the two sections construed together is that, at least so far as suits by trustees are concerned, no court shall acquire any jurisdiction for which a basis cannot be found under the provisions of statutes other than the Bankruptcy Act, except by the consent of the proposed defendants." (Appellees Brief p. 7)

"This contention," says counsel for appellees, "is directly supported by the opinion of Mr. Chief Justice Fuller in the case of *Spencer vs. Duplan Silk Co.*, 191 U. S. 526."

We beg to differ with counsel in this as we do in his view of Section 23.

In the Duplan Silk Company case both the bankrupt and his trustee were citizens of the same State, Pennsylvania, and citizens of a State different from that of the defendant; therefore, the question presented in the case at bar did not and could not arise.

The only question in the Duplan case was whether the judgment of the Circuit Court of Appeals was *final.* This Court held that, as the matter in controversy involved no Federal question and only a common law right, and, as the jurisdiction of the Circuit Court on removal was rested only on a diverse citizenship, the judgment of the Circuit Court of Appeals was final under the Act of 1891, just as a judgment of the Supreme Court of Pennsylvania in the same case would have been final had removal to the Circuit Court not been had.

What, then, is the true meaning of Section 23a and Section 23b?

It rarely happens that a legislative enactment is in language so plain as to escape challenge. Indeed, it seems to be a growing tendency to clothe with an air of mystery the words of statutes, and to discover therein the existence of some occult meaning radically different from that conveyed by the ordinary sense in which the words are used. This tendency is an evil which the courts frequently face and, of which some courts have complained.

In the case at bar, we ask for that construction which we gave to Section 23 at the time we brought this suit, that construction which seemed to us then, and which seems to us now, the clear intent of Congress as expressed by the natural and ordinary meaning of the words used.

In ascertaining "the effect of these two sections, considering the language of each and their relation to one another," it seems to us two things should be kept in mind:

(1) *In the first place*, it was not the intention of Congress that controversies, between trustees and adverse claimants, should be brought within the jurisdiction of the national courts solely because the trustees obtained their title as such through the medium of a Federal Statute.

Bardes vs. Bank, 178 U. S., 537.

It was not the purpose of Congress to make the Bankruptcy Act a means in itself, of enlarging the jurisdiction of the Federal Courts over such controversies. On the contrary, by limiting the right of the trustee to bring suits "in the courts only where the bankrupt might have brought them if proceedings in bankruptcy had not been instituted," such controversies were left "to be tried and determined, for the most part, in the local courts of the State, to the greater economy and convenience of litigants and witnesses."

Bardes vs. Bank, Supra. p. 538.
Shoshone Mining Co. vs. Rutter, 177 U. S. 505.

(2) *In the next place*, the Act of 1898 does not require the trustee to be a citizen of the same State as the bankrupt. The Act, after providing that one or three trustees may be elected, further provides such trustee, whether an individual or a corporation, need only "have an office in the judicial district in which they are appointed." (Secs. 44-45)

Again, the Act of 1898 gives jurisdiction to District Courts:

> "to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside or have their domicile within the United States, but have property within their jurisdiction, etc." (Sec. 2)

When, therefore, Sections 23a and 23b are read in the light of these two considerations, it seems to us difficult to escape the conclusion, that Congress, bearing in mind the possible diversity of citizenship between the bankrupt and his trustee, intended that this *possibility* should not give to any court a jurisdiction it would not have had "if bankruptcy had not occurred," and should not take away from any court a jurisdiction which it would have had "if bankruptcy had not occurred."

In other words, so far as the jurisdiction of courts should depend upon a diversity of citizenship between the parties litigant, Congress made such jurisdiction depend upon the citizenship of the bankrupt and the adverse claimant, without regard to the possibilities of the citizenship of the trustees.

Only in this way could Congress preserve for the creditors of the bankrupt all of the rights which their bankrupt had, and at the same time, preserve to the adverse claimants the right to assert their claims against the trustees *as such* "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants."

But let us consider Section 23a separate and apart from Section 23b.

It is conceded that Section 23a has reference solely to the jurisdiction of the United States Circuit Courts in matters of controversy "between trustees *as such* and adverse claimants, concerning the property acquired or claimed by the trustees." It is further conceded that, in the matter of such controversies, Section 23a gives to or preserves in the adverse claimant the same and identical right to the jurisdiction of the Circuit Court that it gives to or preserves in the trustees as such. Hence, it must follow that the *test* which will determine when the adverse claimant will have the right to bring suit in that Court must also determine

the like right of the trustee. What then, within the contemplation of Section 23a, is the diversity of citizenship between the parties that gives the adverse claimant the right to bring suit in the Circuit Court against trustees as such?

If "bankruptcy had not been instituted," it is conceded in the case at bar that Elliott, a citizen of Alabama, the adverse claimant, would have had the right to bring this suit in the Circuit Court against the Southern Car & Foundry Company, a citizen of New Jersey. Was that right taken away or was it preserved intact by Section 23a? That Section answers the question in these words:

> "The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity..... between trustees as such and adverse claimants..... in the same manner and to the same extent only *as though proceedings in bankruptcy had not been instituted* and such controversies had been between the *bankrupt* and such adverse claimants."

Does not this Section express, as plainly as the English language can express anything, the idea that the right which the adverse claimant would have had against the bankrupt "had bankruptcy proceedings not been instituted" should be preserved in his behalf against the trustees as such?

This fact seems not only self evident from the words of Section 23a, but it is in harmony with the intent of Congress in passing the Act of 1898, as that intent is evidenced by the Act itself, the debates in Congress and the decisions of this Court.

Under Section 2 of the Bankruptcy Act of 1867 the Circuit and District Courts of the United States were given "concurrent jurisdiction of all suits at law or in equity, by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, etc."

Concerning this Section, this Court in *Eyster vs. Gaff,* 91 U. S. 521-525, speaking by Mr. Justice Miller, said:

> "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, *loses none of those rights* by the *bankruptcy of his adversary.* The same Courts remain open to him in such contests, and the Statute has not divested those Courts of jurisdiction in such actions."

In *Bardes vs. Bank,* Supra, this Court points out that, while Congress in passing the Act of 1898 did not see fit to give to the Circuit and District Courts concurrent jurisdiction over such controversies, nevertheless Congress took care to provide in unmistakable language that the adverse claimant "*loses none of those rights* by the *bankruptcy of his adversary*" by providing, in so many words, that he should not.

And the test of such jurisdiction adopted by this Court, is in substance the test prescribed by the very words of Section 23, and is thus expressed by Mr. Chief Justice Fuller:

> "Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any State Court of competent jurisdiction; or, if there was a sufficient jurisdictional amount and the requisite diversity of citizenship existed or the case arose under the constitution, laws or treaties of the United States, he could have brought suit in the Circuit Court of the United States."

If in this we are correct, the effect of Section 23a is not to take away from the adverse claimant the right to avail himself of the aid of the United States Circuit Courts in asserting title to property claimed by trustees as such, if such right would have vested in such claimant against the bankrupt had "bankruptcy proceedings not been instituted."

Therefore, the rights of trustees as such and of adverse claimants under Section 23a being identical, it must follow that trustees as such have the same right.

But if Section 23a be of doubtful meaning and be susceptible of more than one construction, we submit that this doubt is eliminated and the true construction of that Section made certain by virtue of the express terms of Section 23b.

While Section 23b relates only to suits brought by trustees, it fixes the character of all the courts, both State and Federal, in which such suits shall be brought. By express terms it provides that the trustee shall only bring or prosecute suits in those courts where the bankrupt might have brought or prosecuted them "if bankruptcy proceedings had not been instituted."

Therefore, the test prescribed under this provision of the Bankruptcy Act, as to the jurisdiction of any particular court into which the trustee may bring a suit, is whether or not the bankrupt could have brought or prosecuted such a suit in that court "if proceedings in bankruptcy had not been instituted."

Taking this as a test in the case at bar, it is evident that the bankrupt, the Southern Car & Foundry Co., a New Jersey corporation, could have brought suit in the Circuit Court of the United States for the Northern District of Alabama against Elliott, a citizen of Alabama, and a resident of said District, "if proceedings in bankruptcy had not been instituted," and, therefore, it must follow that the trustees of such bankrupt must have the same right.

This, we submit, is not only the unmistakable meaning of that Section, but it is the construction given to that Section by this Court in *Bardes vs. Bank*, Supra.

While, in this last mentioned case, the question before the Court was the jurisdiction given to the District Courts of the United States by Section 23b, nevertheless, the construction therein given to that Section must apply, we think, as well to the right of the trustee to bring suit in the Circuit Court of the United States as it does apply to his right to bring suit in the District Court of the United States or in the State Court.

Many of the District Courts had held that under the provisions of Section 2 of the Act of 1898, a District Court of the United States had jurisdiction to entertain a plenary suit brought by a trustee against an adverse claimant without the consent of the proposed defendant.

This Court held that Section 2 had no application for the reason that it only referred to the jurisdiction of the District Courts in bankruptcy proceedings proper and that the jurisdiction of the District Court in the matter of independent suits between trustees and adverse claimants was controlled exclusively by the provisions of Section 23b.

Under this Section, the *test* of jurisdiction is thus stated by Mr. Chief Justice Fuller:

> "The *second clause positively directs* that 'suits by the trustee shall only be brought or prosecuted in the courts, where the bankrupt whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.'
>
> "Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any state court of competent jurisdiction or if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws or treaties of the United States, he could have brought suit in the Circuit Court of the United States. Act of August 13, 1888, c. 866; 25 Stat. 434. He could not have sued in a District Court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an Act of Congress, a District Court has the powers of a Circuit Court, or is given jurisdiction of a particular class of civil suits."

It is manifest, we submit, that the above test prescribed in Section 23b, as to whether or not the District Court of the United States could have jurisdiction in a suit brought

therein by a trustee against an adverse claimant, is the same test that must be made as to the jurisdiction of the Circuit Court of the United States or of a State Court if suit should be brought in such courts by the trustee.

Taking this, then, as a true construction of Section 23b, it harmonizes with the construction we have heretofore given to Section 23a, and in this manner the two sub-sections of Section 23 are kept from conflict with each other.

To sustain the construction given Section 23a and Section 23b by counsel for appellees, the views of various text writers are cited as authority. But an examination of these authorities will show that, with one exception only, they do not sustain counsel's contention. The most that can be said of them is that, in speaking of the diversity of citizenship necessary to give jurisdiction to the Circuit Courts of the United States in the matter of such controversies, it is difficult to determine whether these writers refer to the citizenship of the trustee or of the bankrupt.

In other words, the best that can be claimed of them by counsel for appellees is they are Delphic Oracles.

The one exception referred to is that of the Cyc. of Law & Procedure. It will be seen, however, that the *premise* of the author does not sustain his *conclusion;* at least, we think this appears to be true when the whole of the author's statement is considered, for it appears that counsel, in dividing the statement in question into two parts, has omitted therefrom a connecting sentence. From the citation given by the author, it is evident he is attempting to state the effect of the decision of this Court in *Bardes vs. Bank.* Beginning with the omitted sentence above referred to, the statement of the author is as follows:

> "And it is further decided that the District Courts of the United States can only entertain jurisdiction of such suits when it appears that the proposed defendant has consented thereto. *(Bardes vs. Bank).* It follows,

therefore, that where the trustee and the proposed defendant are residents of the same State, all such collateral actions must be brought in the State courts unless there is consent to the jurisdiction of the United States Circuit or District Courts."

(5 Cyc. 250-251.)

If we understand correctly the decision of this Court in *Bardes vs. Bank*, the reason why the District Court is without jurisdiction in such controversies between trustees as such and adverse claimants, is because the bankrupt himself could not have brought suit in that Court "if proceedings in bankruptcy had not been instituted."

So that, not only does the *premise* fail to sustain the author's *conclusion*, but the reason of this Court's holding in *Bardes vs. Bank* has altogether escaped the author's attention.

To the contrary, *Loveland on Bankruptcy*, (Second Edition) p. 105, says, concerning Section 23a:

"THE STATUS OF THE BANKRUPT DETERMINES JURISDICTION.

"The Circuit Courts have jurisdiction only in the same manner and to the same extent as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and the adverse claimants. This clause is a limitation upon the exercise of the jurisdiction of the Circuit Courts.

"The judiciary act of 1887, as amended August 13, 1888, conferred jurisdiction upon the Circuit Courts in 'cases arising under the Constitution and laws of the United States.' It is well settled that where the plaintiff holds an office like that of a receiver appointed by the court, or a receiver of a national bank, that the suit involves a federal question, and may be prosecuted in the Circuit Courts without regard to the citizenship of the parties. This rule was applied under the Act of 1867 with reference to assignees. A trustee, being an

officer of the court under the present act, would have undoubtedly been entitled to have prosecuted suits in the Circuit Courts on this ground, were it not for the restriction contained in Section 23a. As it is, however, in order that the Circuit Courts may take cognizance of the controversy, there must exist a *diversity of citizenship*, as *between* the *bankrupt* and the *adverse claimants*, and the amount involved must exceed two thousand dollars. *The citizenship of the trustee is immaterial.* The averments of the first pleading must show that all these jurisdictional requisites exist."

We are not without reason to believe that the above statement, found in the last edition of Mr. Loveland's very able work, was written with full knowledge of the decision of the lower court in the case at bar and after a careful review of the question in the light of the holding of the lower court in this case.

And this view of Mr. Loveland we find is the view taken of Section 23a in every reported opinion of the District Judges we have been able to find. While prior to the decision of this Court in *Bardes vs. Bank* there was much difference in opinion among the District Judges as to the jurisdiction of the District Courts in controversies between trustees as such and adverse claimants, owing to the confusion produced by some of the sub-sections of Section 2 of the Bankruptcy Act, it will be seen that in reference to the jurisdiction of the Circuit Courts all of the reported opinions are in accord, that in-so-far as the jurisdiction of that Court was dependent upon a diversity of citizenship between the parties it rested upon the citizenship of the bankrupt and not of his trustee as such.

In the case at bar, the Southern Car & Foundry Company had at the time of the bankruptcy, a claim against J. M. Elliott, of Alabama, in the sum of $150,000.00. Under the laws of the United States, the Southern Car & Foundry Company had the right to invoke the jurisdiction of the Circuit Court of the United States for the Northern District of Alabama to determine this claim to the end that a fair trial

might be had, free from the influence of the partiality that might exist in favor of Elliott among his neighbors in the little community of Gadsden where he lived. This right was a thing of value to the Southern Car & Foundry Company. Did that right vest unimpaired in the trustees as such for the benefit of the creditors or was it taken away by the Bankruptcy Act?

We submit that under the Act of 1898 the trustees in this case have the same right to sue in the Circuit Courts that the bankrupt would have had "if procedings in bankruptcy had not been instituted," and that, under this construction, the present Bankruptcy Act is made to take from Elliott no right and to take from the creditors of the bankrupt no right, but to preserve the rights of both as such rights would have been *"if proceedings in bankruptcy had not been instituted."*

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